

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARESE SANDERS,

Defendant-Appellant.

UNPUBLISHED

March 3, 2000

No. 208425

Muskegon Circuit Court

LC No. 97-140816-FH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction of possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to twelve to forty years' imprisonment pursuant to MCL 333.7413(2); MSA 14.15(7413)(2) (permitting enhancement for an individual convicted of a second violation of the controlled substances act). We affirm.

I

Defendant first argues that the trial court erred by admitting police officer Mark Baker's expert testimony explaining the significance of the seized contraband and related paraphernalia. We decline to review this issue because defendant did not object at trial to the testimony and has not shown "a plain error that affected substantial rights." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Baker's testimony that, in his opinion, defendant possessed the cocaine was elicited by defense counsel during cross-examination and therefore does not constitute prejudicial error. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 322; 365 NW2d 101 (1984); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995); *People v Brocato*, 17 Mich App 277, 305; 169 NW2d 483 (1969). Although the prosecution's questioning of Baker regarding other cases involving drugs hidden in babies' diapers was irrelevant, defendant "has not demonstrated that it is more probable than not that the outcome would have been different without this error." *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999). Finally, defendant's contention that he was denied the effective assistance of counsel because his trial attorney failed to object to some of this evidence is without merit. Defendant has not shown that his counsel's

“performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

II

Next, defendant argues the search and seizure of the pill bottle and diaper bag were unconstitutional. We disagree. We find that these items were properly seized and searched pursuant to the search incident to arrest exception to the Fourth Amendment’s warrant requirement. Under this exception, the police may search the arrestee and the area within the arrestee’s immediate control, including any closed containers. *Chimel v California*, 395 US 752, 763; 89 S Ct 2034, 2040; 23 L Ed 2d 685 (1969); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1966); *People v Catanzarite*, 211 Mich App 573, 581; 536 NW2d 570 (1995). Although defendant was already removed from the area when the search of the items took place, the search was not unreasonable. *Catanzarite*, *supra* at 581-582; see also *United States v Turner*, 926 F2d 883 (CA 9, 1991), cited with approval in *Catanzarite*, *supra* at 582.

III

Defendant further contends that admission into evidence of the fact that he and a witness were incarcerated before trial, and a police officer’s testimony that the officer was a member of the “violent-crimes fugitive task force,” prejudiced him despite the trial court’s curative instruction in each instance. We disagree. The court did not abuse its discretion by admitting evidence of inculpatory remarks defendant was overheard making to the witness while both were incarcerated. The site of these comments was an integral part of their rendition, and the jury was entitled to know this information as part of the *res gestae*. Furthermore, the court’s limiting instruction assured that no prejudice to defendant occurred. The court also cautioned the jury to disregard the officer’s use of the word “violent.” As this Court noted in *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), “an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.” Under the standard enunciated in *Lukity*, *supra* at 495, “the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” Because it is clear that a different outcome would not have resulted in the absence of the word “violent,” reversal is not indicated.

IV

Defendant also alleges that the evidence is insufficient to convict him of the crime charged. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The crime of possession with intent to deliver less than fifty grams of cocaine is composed of the following elements: (1) that the recovered substance is cocaine; (2) that the cocaine is in a mixture weighing less than fifty grams; (3) that defendant was not authorized to possess the substance; and (4) that defendant knowingly possessed the cocaine with the intent to

deliver. *Wolfe, supra* at 516-517. On appeal, defendant challenges only the evidence that he possessed the cocaine.

We find the evidence sufficient to prove the element of possession. Shortly after his arrest, a pill bottle containing cocaine was discovered in a depression in the insulation of an attic area where he was found hiding. A diaper bag containing more cocaine was found twelve to sixteen feet from the pill bottle. The attic area where the drugs were found was near a bedroom used by defendant and his girlfriend. All others on the premises denied any knowledge or possession of the diaper bag and the pill bottle. Under such circumstances, an adequate nexus exists between the contraband and defendant to warrant attribution of possession to him. *Wolfe, supra* at 521.

V

Defendant next argues that the trial court erred by instructing the jury that there was some evidence that he hid after the alleged crime. CJI2d 4.4. Where, as here, defendant did not object to the instruction given, he “must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings.” *Carines, supra* at 774. Because defendant has failed to satisfy this standard, reversal is not warranted.

VI

Defendant additionally maintains that the trial court abused its discretion by giving a supplemental jury instruction after deliberations had begun. Defendant did not object to the instruction and has not satisfied the standard of review set forth in *Carines, supra*. Moreover, because the giving of the instruction was proper, MCR 2.516(B)(4), defense counsel’s failure to object does not constitute the ineffective assistance of counsel.

VII

Defendant also contends that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant’s sentence was enhanced pursuant to MCL 333.7413(2); MSA 14.15(7413)(2), because this was his second controlled substances conviction. He had also absconded from parole. He had one prior felony conviction and several felony charges pending at the time of sentencing, and his presentence investigation report indicates that, while on parole and tether, he missed a number of substance abuse counseling appointments and tested positive for marijuana and cocaine. Defendant’s sentence is proportionate to the seriousness of the crime and his prior record. *Id.* at 635-636, 654.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald